A Uniform Approach to the Unlicensed Practice of Medicine

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> Even among the sciences, medicine occupies a special position. Its practicioners come into direct and intimate contact with people in their daily lives; they are present at the critical transition moments of existence. They serve as intermediaries between science and private experience, interpreting personal troubles in the abstract language of scientific knowledge. For many people, they are the only contact with a world that otherwise stands a forbidding distance. Physicians offer a kind of individualized objectivity, a personal relationship as well as authoritative counsel… Often in pain, fearful of death, the sick have a special thirst for reassurance and vulnerability to belief.[2]

One morning, Jennifer drove her mother Irene to a local tile supply store for a "cosmetic procedure."[3] Irene was going to see John and Jenny, a husband and wife who were visiting from their home in Columbia. Irene found an advertisement for cosmetic procedures in her local beauty shop, and one of her friends had already received the procedure with no problems. Irene went the previous week to receive Botox injections in her face. After she noticed no side-effects from that visit, she scheduled an additional procedure for buttock enhancement.

She arrived with Jennifer and was shown to a back room to prepare for the procedure. The couple first injected her with local anesthetic, and then proceeded to start injecting a "gel like" substance into Irene's buttocks. After the first of several injections, Jennifer became squeamish and let Irene, John, and Jenny know that she would return in four hours to pick up her

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[2] Paul Starr, The Social Transformation of American Medicine 4-5 (1982)

[3] This story is based on the case of Elena Caro, who died on April 9, 2011 in Las Vegas as a result from a procedure performed by Ruben Dario Matallana-Galvas and his wife Carmen Olfidia Torres-Sanchez. The story received worldwide news coverage, and the following articles were used to assemble this fact pattern: Paul Harasim and Mike Blasky, *Backroom Surgery Death Raises Questions About 'Makeshift' Doctors,* LAS VEGAS REV. J. (Apr. 11, 2011), http://www.lvrj.com/news/woman-who-died-after-cosmetic-procedure-identified-119611014.html; Francis McCabe, *Columbian Couple Plead Guilty in Unlicensed Surgery Death,* LAS VEGAS REV. J. (Aug. 4, 2011), http://www.lvrj.com/news/colombian-couple-plead-guilty-in-connection-to-unlicensed-surgery-death-126778633.html; Francis McCabe, *Couple Going to Prison in Woman's Death After Surgery,* LAS VEGAS REV. J. (Oct. 20, 2011), http://www.lvrj.com/news/pair-whose-illegal-plastic-surgery-led-to-woman-s-death-sentenced-132262758.html.

mother. While leaving, Jennifer said, "Take care of her, please." John replied, "Everything is going to be fine. Don't worry," and continued with the procedure. Irene did well at first, and even called Jennifer an hour into the procedure to let her know everything was alright.

However, the procedure did not go as planned. Jennifer returned to an empty building with re-arranged furniture, and no sign of her mother. She called repeatedly with no answer. She was upset and worried—her mother had not informed her father, aunt and uncle about the procedure because she was afraid they would try and "talk her out of it." After a few hours, Jennifer called the local police and reported her mother as missing.

By this time, Irene had walked nearly three miles in an unfamiliar part of town, in obvious pain. Worried witnesses called 911, and an ambulance took her to a local hospital. Unfortunately, it was too late. Irene passed away from apparent complications from the lidocaine. What began as a missing person report turned quickly into a murder investigation.

The police arrested John and Jenny at the airport, where they were trying to board a flight home to Columbia. The local district attorney charged them both with second degree murder and the unlicensed practice of medicine. Prior to trial, the couple pleads guilty to involuntary manslaughter, the unlicensed practice of medicine, and conspiracy.

The couple appeared repentant at the sentencing hearing. John spoke in open court, acknowledging that it was "a mistake to behave the way we did," and told Irene's family, "I hope that someday with God's help you can forgive me." The statement provided little solace to a family who had lost a loved one forever. Especially considering the couple abandoned Irene when she reacted adversely to the local anesthetic, instead of calling 911.

The judge allowed for the couple's statements, and points out the serious nature of their actions. She sentenced them to the maximum allowed under the law—four to eight years in

prison. The prosecutor would have liked to pursue the second degree murder charge, but unfortunately burden of proof was high under the law. The couple did not use "illegal substances" during the procedure, which was a requirement under the murder statute.[4]

The Unlicensed Practice of Medicine

Unfortunately, the nightmare outlined above is becoming more common throughout the United States. Although the problem seems to be more prevalent within immigrant populations, the unlicensed practice of medicine is not limited to those circumstances.[5] In response, states are developing campaigns to increase awareness, increase penalties for the unlicensed practice of medicine, and increase enforcement of those penalties.

This paper has four parts. will focus on the following: Part I of this paper will provide a brief history of medical licensing acts, including the rise of the profession and the public policy for regulation. Part II will identify and compare statutory language, including how states define the "practice of medicine," penalize unlicensed practice, relevant case law, and policy considerations. Part III will compare enforcement practices and jurisdictional issues. Finally, Part IV will propose uniform statutory language focused on increasing deterrence and discouraging illegal practice.

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[4] "Murder is the unlawful killing of a human being: 1. With malice aforethought, either express or implied; 2. **Caused by a controlled substance** which was sold, given, traded or otherwise made available to a person in violation of chapter 452 of NRS…" NEV. REV. STAT. § 200.010 (2005); *compare to* "involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such consequence in an unlawful manner, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonies intent, the offense is murder." NEV. REV. STAT. § 200.070 (2005).

[5] *See e.g*, Jerry DeMarco, *Radio Host 'Dr. Al' Charged with Unlicensed Practice of Medicine, Surgery,* Jan. 17, 2012, http://www.cliffviewpilot.com/bergen/3273-radio-host-dr-al-charged-with-unlicensed-practice-of-medicine-surgery (Doctor whose license was revoked was arrested for practicing medicine and conducting surgery without a license for offering nutritional counseling to patients in New Jersey); Teresa Masterson and Dan Stamm, *NJ Woman Questioned in Alleged Butt Implant Death*, Feb. 9, 2011, http://www.nbcphiladelphia.com/news/local/Tourist-Dies-After-Butt-Implant-Procedure-at-Philly-Hotel-Source-115583299.html (student from England dies after flying into Philadelphia to have silicone injected into her buttocks; was part of a group of four students who traveled to United States for procedures).

Part I – The Historical Background of Medicine, Licensing and Regulation

Contrary to modern belief, doctors have not always enjoyed positions of "honor and comfort."[6] The Romans considered the practice of medicine a "low-grade" profession; while in 18th century England physicians struggled to gain recognition from the rich in hope of receiving a title or estate.[7] Likewise, in the United States, a 19th century professional journal noted: "In all of American colleges…medicine has ever been and is now, the most despised of all the professions which liberally-educated men are expected to enter."[8]

However, the profession began to change dramatically in the late 19th century. Society became more dependent upon professionals with "superior competence," resulting from advances in science and diagnostic medicine.[9] As this dependence increased, so did the need for ethical regulation and licensing.[10] The states recognized that dependence creates an opportunity to prey on the weak, by individuals using "superior entrusted positions" to take advantage of, threaten, and harm their clients.[11]

Licensure and Regulation

As a result, lawmakers and policy-makers implemented regulations to govern the practice of medicine, including licensing requirements and ethical standards.[12] In the United States, the

[6] Starr, *supra* note 2, at 6.
[7] Id.
[8] *Id.* at 7 (internal quotes omitted).
[9] *Id.* at 11.
[10] Id.
[11] *Id.*
[12] *Id.* at 260. Starting in the 1920s, legislators, district attorneys, AMA publicists, and public health officials moved aggressively against "quackery" and exposed and prosecuted "cultists" and persons operating "diploma mills." *See also*, 102-112 for a general description of licensing progress and the rise of medical regulation.

Constitution grants individual states the authority to regulate "occupational licensing."[13] By the early 1900s, each state enacted "Medical Practice Acts," designed to protect their citizens from potentially harmful services conducted by unqualified providers.[14]

The early Acts defined the "scope of practice" in extremely broad terms. The practice of medicine included almost anything relating to "health or sickness," which granted licensees an "exclusive right to practice."[15] As late as the 1960s and 1970s, even registered nurses could not perform ordinarily routine procedures, including taking blood pressures, starting IVs, or drawing blood, unless "ordered" by a physician.[16]

Eventually, other health care professionals sought legal authority to practice within their own defined scopes.[17] However, "legally speaking," their own scope of practice could only be "carved out" of medicine's "universal domain."[18] As a result, state licensing statutes became complicated webs, with multiple divisions among health professions, regulatory boards, and "scopes" of practice.[19] In response, many have called for legislative reforms to provide greater

[13] *See* Timothy S. Jost, *Introduction—Regulation of the Healthcare Professions,* REGULATION OF THE HEALTHCARE PROFESSIONS 7 (Timothy S. Jost, ed., 1997). The Tenth Amendment reserves to "the states and to the people" the powers not specifically delegated to the United States. U.S. Const. amend. X.
[14] Barbara J. Safriet, C*losing the Gap Between Can and May in Health-Care Providers' Scopes of Practice: A Primer for Policymakers*, 19 YALE J. ON REG. 301, 306 (2002).
[15] *Id.* at 307. (citing Eliot Freidson, Profession of Medicine: A Study of the Sociology of Applied Knowledge 47 (1970)).
[16] *Id.* As an additional example, up to the late 1970s only doctors had the authority to pierce ears.
[17] *Id.* at 308.
[18] Id.
[19] For example, the Nevada Revised Statutes include chapters regulating the following professions: Physicians, Physicians assistants, Medical assistants, Perfusionists and Practicioners of Respiratory Care (Chapter 630); Homeopathic medicine (Chapter 630A); Dentistry and Dental Hygience (Chapter 631); Nursing (Chapter 632); Osteopathic Medicine (Chapter 633); Chiropractic (Chapter 634); Oriental Medicine (Chapter 634A); Podiatry (Chapter 635); Optometry (Chapter 636); Dispensing Opticians (Chapter 637); Hearing Aid Specialists (Chapter 637A); Audiologists and Speech Pathologists (Chapter 637B); Veterinarians (Chapter 638); Pharmacists (Chapter 639); Physical Therapists (Chapter 640); Occupational Therapists (Chapter 640A); Athletic Trainers (Chapter 640B); Massage Therapists (Chapter 640C) ; Music Therapists (Chapter 640D); Dietetics (Chapter 640E), Psychologists (Chapter 641). *See also*, infra n. 80.

consistency, "instead of the widely disparate practice parameters encountered by most providers both between and within states."[20]

Public Policy

There is no dispute that states have a strong interest in protecting their citizens. And licensure statutes "establish and enforce minimum levels of quality control in a given professional field."[21] Legislators and judges often support and uphold this strong public policy interest.[22] Medical Practice Acts and statutes governing other healing arts usually address three central concerns: "first, controlling the quality of practitioners through establishing standards for entry-to-practice and scope of practice; second, prescribing standards of professional conduct to be observed by licensees; and, third, enforcing those standards through designated disciplinary procedures."[23]

However, policy makers should keep other important factors in mind while drafting any regulations. This includes the individual liberty that our country was founded on. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[24] Therefore, as a matter of public policy, states must also balance an individual's right to make decisions with the need to protect citizens at large.

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[20] Safriet, *supra* n. 14 at 323.

[21] Alison M. Sulentic, *Crossing Borders: The Licensure of Interstate Telemedicine Practitioners*, 25 J. LEGIS. 1, 5 (1999).

[22] *Id.* n.25 (In the words of one court, licensure statutes provide "legal safeguards" against "insipid and often harmful patent medicines and the ministrations of untrained healers." *Garcia v. The Texas State Bd. of Med. Exam'rs*, 384 F. Supp. 434, 438 (W.D. Tex. 1974). *See also, State v. Rich*, 339 N.E.2d 630, 632 (Ohio 1975) ("The statutes evidence the intent of the General Assembly to protect the public from the practice of medicine by unlicensed, and perhaps unqualified, practitioners"); *Erlanger v. Regents*, 10 N.Y.S.2d 1013, 1019 (N.Y. App. Div. 1939) (state must protect "the home of the sick and distressed from the intrusion therein in a professional character of those destitute of the proper qualifications").

[23] *Id.* at 6.

[24] Michael H. Cohen, *A Fixed Star in Health Care Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. ST. L.J. 79, 79 (1995)(quoting *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943)).

Penalties for Unlicensed Practice

One way for states to protect their citizens is to deter unlicensed practice. As a result, each state not only defines the "authorized" practice of medicine; but also defines and punishes the "unauthorized practice."[25] Usually, the unauthorized practice of medicine occurs in three scenarios.[26]

First, a person could be performing procedures with no license at all, but there could be ambiguity as to whether the procedures qualify as the "practice of medicine."[27] In these cases, the primary focus is whether the activities fall under the definition of the "practice of medicine." If so, the accused would be guilty if they did not hold a valid license.[28] Examples include: (1) naturopaths who prescribe healing salves;[29] (2) midwives who give exams and prescribe prenatal programs;[30] and (3) "foreign medical graduates" who "examine and write prescriptions" for patients.[31] These cases generally involve people who have experience in the health care field, but perform procedures that fall under the definition of the "practice of medicine."

Second, an otherwise licensed practicioner could perform activities outside the scope of their field. Here, investigators focus on whether the person held a license, and if "the activities in which he engaged exceeded the authority of that license."[32] And if so, do the activities qualify as the practice of medicine.[33] For example, in some states a physician assistant is authorized to

[25] Sulentic, *supra* n. 21 at 9.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* (citing *State v. Howard*, 337 S.E.2d 598 (N.C. Ct. App. 1985)).
[30] *Id.* (citing State ex. Rel. Missouri State Bd. Of Regulation for the Healing Arts v. Southworth, 704 S.W.2d 219 (Mo. 1986)).
[31] *Id.* (citing *People v. Varas*, 487 N.Y.S.2d 577 (N.Y. App. Div. 1985)).
[32] *Id.*
[33] *Id.*

perform certain "medical services," with supervision.[34] If the physician assistant performs those services without supervision, they may guilty of the unlicensed practice of medicine.[35]

Third, a person could be "holding oneself out" as a licensee, performing treatments clearly within the scope of the practice of medicine. In these cases, the accused will deliberately mislead the public and claim to be licensed or qualified in some way.[36] This is an extremely dangerous category, as the offenders oftentimes prey on unsuspecting and innocent victims, taking advantage and exploiting their weaknesses and hopes. [37]

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[34] *Id.* at 10.

[35] *Id.* n.58:

> *See, e.g.*, *Magit*, 366 P.2d at 820 (nurses would be guilty of illegally practicing medicine or surgery only if acting outside the permissible scope of a nurse's functions as set forth in the applicable statute) (dicta*); Rich*, 339 N.E.2d at 633 (practice of acupuncture falls within the practice of medicine and one who holds a limited license to practice chiropractic medicine may not go beyond the rules and regulations promulgated by the State Medical Board concerning the scope of chiropractic medicine); *Kelley v. Texas State Bd. of Med. Exam'rs*, 467 S.W.2d 539 (Tex. Civ. App. 1971) (licensed dentist who represented himself as a physician by professing to diagnose or treat cancer or who actually attempts to diagnose or cure cancer is acting outside the scope of his license as a dentist); *De Hay v. State*, 254 S.W.2d 513 (Tex. Crim. App. 1952) (whether defendant was licensed as a naturopath was irrelevant to inquiry as to whether he practiced medicine without a license when the law expressly provided that a license to practice naturopathy did not authorize the practice of medicine). The mere fact that an individual's training exceeds the minimal qualifications necessary to practice in his field does not entitle him to be exempted from the statutory requirements. *See State v. Wilson*, 528 P.2d 279 (Wash. App. 1974) (chiropractor who practiced acupuncture and took blood samples engaged in the practice of surgery, which was beyond the scope of his license).

[36] *Id.* n.60:

> *See e.g. People v. Doneski*, 679 N.E.2d 462 (Ill. App. Ct. 1997) (upholding conviction of unlicensed individual who falsified her resume, referred to herself as "Dr." and instructed others to do the same); *State v. Bain*, 295 P.2d 241 (Mont. 1956); *State v. Low*, 74 P.2d 458 (Wash. 1937) (an unlicensed person who advertised free consultations and "wonderful treatment" and included references to himself as a "doctor" held himself out as practicing medicine, even though the state made no showing that the "wonderful treatment" involved the use of drugs or medicinal preparations).

[37] *See e.g.*, n.3; n.5.

Part II – Medical Practice Acts

General Overview

States have the "police power" to regulate professions within their borders.[38] As such, States may prevent "indiscriminate conduct by unskilled and unlicensed practicioners of the healing arts,"[39] and protect the public from "the menace of the ignorant, the unprepared, the quacks and the fakers."[40]

There is no universal definition of the practice of medicine.[41] All states, however, include at least a combination of the following:

> (1) diagnosing, preventing, treating, and curing disease; (2) holding oneself out to the public as able to perform the above; (3) intending to receive a gift, fee, or compensation for the above;[42] (4) attaching such titles as "M.D." to one's name;[43] (5) maintaining an office for reception, examination, and treatment[44]; (6) performing surgery[45]; and (7) using, administering, or prescribing drugs or medicinal preparations.[46] [47]

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[38] Cohen, *supra* n. 24 at n. 114 (The states "police power" includes the "residual prerogatives of sovereignty which the states [have] not surrendered to the federal government"); n. 115 (Under "police power" the state legislature may decide whether to require a license to practice midwifery, and also identify the qualifications and procedures allowed. Citing *Peckman v. Thompson*, 745 F.Supp. 1388, 1391 (C.D. Ill. 1990)).

[39] *Id.* n. 117. (citing *People v. Amber*, 349 N.Y.S.2d 604, 612 (Sup. Ct. 1973), disallowing the practice of acupuncture).

[40] *Id.* n. 118. (quoting *People v. Steinburg*, 73 N.Y.S.2d 475, 477 (Mag. Ct. 1947)).

[41] *Id.* at 98.

[42] *Id.* at 99. A number of states include an intent of "receiving compensation, or a fee or gift." In comparison, Hawaii, Louisiana and Utah specifically state that one can be guilty "either gratuitously or for pay."

[43] *Id.* at 100-101. In about half the states, if a person uses the following titles: "doctor," "doctor of medicine," "doctor of osteopathy," "physician," "surgeon," "physician and surgeon," "Dr.," "M.D.," "D.O.;" that constitutes the practice of medicine.

[44] *Id.; see e.g.* IND. CODE ANN. § 25-22.5-1-1.1 (West) ("The maintenance of an office or a place of business for the reception, examination, or treatment of persons suffering from disease, ailment, defect, injury, infirmity, deformity, pain, or other conditions of body or mind," constitutes the practice of medicine.); *Black v. State*, 86 Tex. Crim. 253, 254, 216 S.W. 181, 181 (1919) (maintaining an office to treat people was held to constitute the practice of medicine, whether or not defendant claimed to be a physician or medical practitioner).

[45] *Id.*; *see. e.g* IND. CODE ANN. § 25-22.5-1-1.1 (West)("the performing of any kind of surgical operation upon a human being, including tattooing, except for tattooing (as defined in IC 35-42-2-7), in which human tissue is cut, burned, or vaporized by the use of any mechanical means, laser, or ionizing radiation, or the penetration of the skin or body orifice by any means, for the intended palliation, relief, or cure;" constitutes the practice of medicine.); WIS. STAT. ANN. § 448.01 (West) ("to penetrate, pierce or sever the tissues of a human being").

[46] *See e.g., State v. Baker*, 229 N.C. 73, 79, 48 S.E.2d 61, 66 (1948) ("Hence, the term 'drugs' embraces patent or proprietary remedies possessing or reputed to possess curative or remedial properties sold and used for medicine"); N.M. STAT. ANN. § 61-6-6 (West) ("offering or undertaking to give or administer, dispense or prescribe a drug or medicine for the use of another person, except as directed by a licensed physician").

States use many different variations of these terms in their definitions.[48] At a minimum, states usually include words such words as "diagnosis," "treatment," "prevention," "cure," "advise" and "prescribe."[49] And these words are usually accompanied by: "disease," "injury," "deformity," and "mental or physical condition."[50] States tend to keep their definitions extremely broad to ensure that anything relating to health care is included in the "field of healing."[51]

However, legislators must be careful when drafting broad legislation. If legislators draft overly broad legislation, they expose the laws to attacks based on unconstitutional grounds, including the theory of being "void for vagueness."[52] Thus, lawmakers should avoid statutes that include facts that are "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." [53]

State Comparisons

The following section will: (1) analyze and compare the statutory language and corresponding penalties for California, Oklahoma, and Florida; (2) discuss relevant case law; (3) discuss relevant policy considerations.

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[47] Cohen, *supra* n. 24 at 99.
[48] *See* Appendix I, which identifies each state's definition of "the practice of medicine," as well as corresponding penalties for unlicensed practice.
[49] Cohen, *supra* n. 24 at n. 120.
[50] *Id.*
[51] *Id.* at 98. ("For example, reading Michigan's statute literally, 'relieving . . . a . . . complaint . . . by . . . advice' constitutes practicing medicine… Similarly, under the Arkansas statute, 'suggesting . . . any form of . . . healing for the intended palliation' constitutes the 'practice of medicine.'") *See also* HAW. REV. STAT. § 453-1 (West) (" For the purposes of this chapter the practice of medicine…includes the use of drugs and medicines, water, electricity, **hypnotism**, osteopathic medicine, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject")(emphasis added).
[52] *See. e.g. United States v. Williams*, 553 U.S. 285, 306, 128 S. Ct. 1830, 1846, 170 L. Ed. 2d 650 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—**wholly subjective judgments** without **statutory definitions, narrowing context,** or **settled legal meanings**)(emphasis added).
[53] *Id.*

California

California defines the practice of medicine and includes penalties for unauthorized practice in one code section. Section 2052 of the California Business and Professions Code defines the practice of medicine as follows:

> (a)…any person who **practices or attempts** to practice, **or** who **advertises or holds himself or herself out as practicing**, any **system or mode of treating the sick** or afflicted in this state, **or** who **diagnoses**, **treats, operates for**, **or** prescribes for **any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person** [54]

The Section then defines the penalty for unlicensed practice as follows:

> without having **at the time of so doing** a **valid, unrevoked, or unsuspended certificate**…**or** without being authorized to perform the act pursuant to a certificate obtained **in accordance with some other provision of law is guilty** of a public offense, punishable by a **fine** not exceeding…($10,000), by **imprisonment** pursuant to subdivision (h) of Section 1170 of the Penal Code [state prison], by **imprisonment** in a county jail not exceeding one year, **or by both** the fine and either imprisonment.[55]

The Section also penalizes persons who "aid and abet" unlicensed practice as follows:

> (b) Any person who **conspires with or aids or abets** another to commit **any act** described in subdivision (a) **is guilty** of a public offense, subject to the punishment described in that subdivision.[56]

The provision above is extremely broad. It uses expansive words, such as "or," "any," and "both," and punishes not only actors, but anyone who "aids or abets another." Additionally, the provision lacks words expressing any intent or knowledge requirement typically seen in criminal statutes (knowingly, willfully, with malice, etc.). The legislative intent is clear: the unlicensed practice of medicine is a serious offense, with serious punishment.

[54] CAL. BUS. & PROF. CODE § 2052 (West) (emphasis added).
[55] *Id.* (emphasis added).
[56] *Id.* (emphasis added).

Legislative History

The California Legislature clearly identified their intent when it amended the Medical Practice Act in 2002. Prior to the amendment, California had two separate statutes for the unlicensed practice of medicine—Sections 2052 and 2053 of the Business and Professions Code.[57] Section 2052 made it "a misdemeanor for one without a license to practice, attempt to practice, advertise or hold himself or herself out as practicing medicine, or to diagnose treat, or prescribe for any physical condition of any person.[58] Section 2053 punished the same conduct, but included a focus on harm and intent, and also increased the punishment to a felony.[59] In 2002, the Legislature repealed Section 2053, deleted the intent and harm requirement, and made any violation a felony punishable by jail, a fine, or both.

Case Law

California appellate courts have regularly upheld convictions for the unlicensed practice of medicine. The courts have done so under challenges to the constitutionality of Section 2052,[60] usually relying on a strong a strong presumption that enforcement is a "reasonable exercise of state police power."[61]

In *Hegeseth v. Superior Court*, the court noted that:

> [S]ection 2052 of the Business and Professions Code, prohibits the act of holding oneself out "as practicing any system or mode of treating the sick or afflicted in this state," or practicing such a system or mode of treatment by diagnos[ing], treat[ing], operat[ing] for, or prescrib[ing] for any .... physical or mental

[57] *See* CAL. BUS. & PROF. CODE §§ 2052, 2053 (West). Section 2053 was repealed by Stats. 2002, c. 1085 (S.B. 1950), §15.
[58] *People v. Burroughs*, 234 Cal. App. 3d 245, 246-47, 285 Cal. Rptr. 622, 623 (Ct. App. 1991).
[59] *Id.* (when done "willfully, under circumstances or conditions which cause or create risk of great bodily harm, severe physical or mental illness, or death).
[60] *See e.g. People v. Cantor*, 198 Cal. App. 2d Supp. 843, 852, 18 Cal. Rptr. 363, 368 (App. Dep't Super Ct. 1961) ("If the words of the statute set forth in a pleading are sufficient to permit an ordinary person to understand what he is being charged with, it is difficult to ascertain how those same words of the statute itself could be held to be vague and uncertain, so as to make it impossible for a defendant properly to defend himself.").
[61] *See Hageseth v. Superior Court*, 150 Cal. App. 4th 1399, 1416, 59 Cal. Rptr. 3d 385, 398 (2007).

> condition of any person, without having at the time of doing so a valid license. The criminalization of these acts represents a reasonable exercise of the state police power, **as the statute was designed to prevent the provision of medical treatment to residents of the state by persons who are inadequately trained or otherwise incompetent to provide such treatment**, and who have not subjected themselves to the regulatory regime established by the Medical Practice Act.[62]

The court found the prosecution of a Colorado doctor was proper, based on the following facts. The doctor reviewed on online questionnaire from a California resident, and subsequently issued an online prescription of a drug called "fluoxetine" to the resident.[63] Several weeks later, the resident committed suicide while under the influence of alcohol and "fluoxetine."[64] The Medical Board of California filed a complaint, which was forwarded to the San Mateo County District Attorney's office for criminal prosecution.[65] In turn, the district attorney filed a criminal complaint for "willfully and unlawfully practicing medicine…without a valid license to do so, in violation of Business and Professions Code section 2052."[66]

In response to a warrant for his arrest, the doctor filed a motion to quash the warrant, and a motion to dismiss based on lack of jurisdiction.[67] The superior court denied both motions, although the judge did state, "I'm not convinced yet that there isn't jurisdiction within the state of California.[68] The doctor filed an instant writ challenging the decision immediately after the court's denial.[69]

The appellate court affirmed the lower court's decision, finding that jurisdiction was proper. In doing so, the court noted that:

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[62] Id.
[63] *Id.* at 1404, 59 Cal. Rptr. 3d at 387-388.
[64] Id.
[65] Id.
[66] *Id.* at 1405.
[67] *Id.* at 1404, 59 Cal. Rptr. 3d at 389.
[68] Id.
[69] Id.

> As we have said, the acts forbidden by Business and Professions Code section 2052 **(the actus reus)** are (1**) holding oneself out as practicing "any system or mode of treating the sick or afflicted in this state," and (2) actually treating the sick and afflicted in this state, as by, among other things, "prescribing" medication for such persons.** A preponderance of the evidence shows petitioner prescribed medication for a resident of this state, aware of the virtual certainty his conduct would cause the prescribed medication to be sent that person at his residence in California.[70]

To the court, it was irrelevant where the "practice" took place. In order to be prosecuted for a violation of section 2052, the relevant focus was on whether or not the defendant: (1) held himself out to practice, and (2) treated a resident of the state. The decision reinforced a strong policy favoring a state's power to protect its citizens.

Policy Considerations

California also recognizes and balances an individual's right to make their own decisions.[71] Sections 2053.5 and 2053.6 of the California Business and Professional Code identify exceptions to Section 2052.

Section 2053.5 provides that:

> …notwithstanding any other provisions of law, a person who complies with the requirements of Section 2053.6 **shall not be in violation of… Section 2052**, unless that person does any of the following:
>
> (1) Conducts surgery or any other procedure on another person that punctures the skin or harmfully invades the body.
> (2) Administers or prescribes X-ray radiation to another person.
> (3) Prescribes or administers legend drugs or controlled substances to another person.
> (4) Recommends the discontinuance of legend drugs or controlled substances prescribed by an appropriately licensed practitioner.
> (5) Willfully diagnoses and treats a physical or mental condition of any person under circumstances or conditions that cause or create a risk of great bodily harm, serious physical or mental illness, or death.

[70] *Id.* at 1416-1417, 59 Cal. Rptr. 3d at 398. (emphasis added).
[71] Cohen, *supra* n. 24.

(6) Sets fractures.
(7) Treats lacerations or abrasions through electrotherapy.
(8) Holds out, states, indicates, advertises, or implies to a client or prospective client that he or she is a physician, a surgeon, or a physician and surgeon.[72]

However, under Section 2053.6, any person who provides services "pursuant to Section 2053.5" must do the following prior to providing the services:

> (1) Disclose to the client **in a written statement**… the following information:
>
> > (A) That he or she is **not a licensed physician**.
> > (B) That the treatment is **alternative or complementary** to healing arts services licensed by the state.
> > (C) That the services to be provided **are not licensed** by the state.
> > (D) The **nature of the services** to be provided.
> > (E) The **theory of treatment** upon which the services are based.
> > (F) His or her educational, training, experience, and other **qualifications regarding the services to be provided**.
>
> (2) **Obtain a written acknowledgment** from the client stating that he or she has been provided with the information described in paragraph (1). The client shall be provided with a copy of the written acknowledgement, **which shall be maintained by the person providing the service for three years**.
>
> > …
> > (c) Nothing in this section or in Section 2053.5 shall be construed to do the following:
> >
> > > (1) Affect the scope of practice of licensed physicians and surgeons.
> > > (2) Limit the right of any person to seek relief for negligence or any other civil remedy against a person providing services subject to the requirements of this section.[73]

Therefore, while California recognizes freedom to explore alternative therapies, the state still identifies significant procedures to protect their citizens. Specifically, Section 2053.5(a)1-8

[72] Cal. Bus. & Prof. Code § 2053.5 (West)
[73] Cal. Bus. & Prof. Code § 2053.6 (West)

categorizes treatments that clearly require a license. Further, Section 2053.6 imposes further requirements, such as: (1)disclosures be made in writing, (2) acknowledged in writing, and that (3) the practicioner keep the records for a three year period.

Oklahoma

Oklahoma outlines the "practice of medicine" and the penalties for unlicensed practice in Title 59 of the Oklahoma Statutes, §§ 491 and 492. Oklahoma defines the practice of medicine as follows:

> C. The definition of the practice of medicine and surgery shall include, **but is not limited to**:
>
> 1. **Advertising, holding out to the public, or representing in any manner** that one is authorized to practice medicine and surgery in this state;
> 2. **Any offer or attempt to prescribe, order, give, or administer any drug or medicine and surgery** for the use of any other person, except as otherwise authorized by law;
> 3. a. **Any offer or attempt**, except as otherwise authorized by law, to **prevent, diagnose, correct, or treat in any manner or by any means, methods, devises, or instrumentalities** except for manual manipulation **any disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition of any person**, including the management of pregnancy and parturition, except as otherwise authorized by law.
>
> b. Except as provided in subsection D of this section, performance by a person within or outside of this state, through an ongoing regular arrangement, of **diagnostic or treatment services,** including but not limited to, stroke prevention and treatment, **through electronic communications** for any patient whose condition is being diagnosed or treated within this state by a physician duly licensed and practicing in this state. **A person who performs any of the functions covered by this subparagraph submits himself or herself to the jurisdiction of the courts of this state for the purposes of any cause of action resulting from the functions performed.**
>
> c. Nothing in the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act shall be construed

> **to affect or give jurisdiction to the Board over any person other than medical doctors or persons holding themselves out as medical doctors**;
> 4. **Any offer or attempt to perform any surgical** operation upon any person, except as otherwise authorized by law;
> 5. The use of the title Doctor of Medicine, Physician, Surgeon, Physician and Surgeon, Dr., M.D. or any combination thereof in the conduct of any occupation or profession pertaining to the prevention, diagnosis, or treatment of human disease or condition unless, where appropriate, such a designation additionally contains the description of another branch of the healing arts for which one holds a valid license in this state.[74]

Similar to California, Oklahoma uses expansive terms such as "any offer or attempt," "but is not limited to;" and qualifications such as "advertising," "diagnose," and "prescribe." The Oklahoma statute also includes more examples of "practice," such as using a "title," "electronic communications,"[75] and also specifically states that the Board only has jurisdiction over "medical doctors or persons holding themselves out as medical doctors."

Oklahoma defines the unlicensed practice of medicine and corresponding penalty as follows:

> 1. Every person before practicing medicine and surgery or any of the branches or departments of medicine and surgery … **must be** in legal possession of the unrevoked license or certificate …
>
> 2. Any person practicing … who is not in the legal possession of a license or certificate, shall, **upon conviction**, be guilty of a felony, punishable by a fine in an amount not less than One Thousand Dollars ($1,000.00) nor more than Ten Thousand Dollars ($10,000.00), or by imprisonment in the county jail for a term of not more than one (1) year or imprisonment in the custody of the Department of Corrections for a term of not more than four (4) years, or by both such fine and imprisonment.
>
> 3. **Each day a person is in violation** of any provision of this subsection **shall constitute a separate criminal offense** and**, in addition, the district attorney may file a separate charge of**

[74] 59 OKLA. ST. ANN. § 492 (West).
[75] *See* App'x I. Several states use these terms to regulate ban "telemedicine."

> **medical battery for <u>each person</u> who is injured as a result of treatment or surgery performed in violation of this subsection**.
>
> 4. Any person who practices medicine and surgery or any of the branches or departments thereof without first complying with the provisions of the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, the Oklahoma Osteopathic Medicine Act, or the Oklahoma Interventional Pain Management and Treatment Act shall, in addition to the other penalties provided therein, receive no compensation for such medical and surgical or branches or departments thereof services.[76]

Similar to California, Oklahoma includes very serious penalties for the unlicensed practice of medicine. Additionally, Oklahoma includes serious aggravating factors, declaring that each **<u>day</u>** a person violates the provision counts as a "separate criminal offense." Further, a district attorney may file a separate charge for medical battery for **<u>each person</u>** injured from treatment. Again, these terms evidence a serious legislative intent to enforce and punish the unlicensed practice of medicine.

<u>Legislative History</u>

The Oklahoma Legislature also increased the penalty for the unlicensed practice of medicine in 2008.[77] Prior to 2008, Section 491 included a penalty as follows: (1) for the first offense, a minimum $1,000 fine, and a maximum of $5,000; (2) for any "succeeding offense," imprisonment in county jail for "not less than thirty (30) days, nor more than one hundred eighty (180) days."[78] The Legislature increased the penalty greatly, including an increased fine, increased jail sentence, and the express provision that the district attorney could file a "separate charge for medical battery for each person who is injured as a result of treatment or surgery."

[76] 59 OKL.ST.ANN. § 491 (West)
[77] 2008 OKLA. SESS. LAW SERV. Ch. 358 (H.B. 2732) (WEST)
[78] Id.

Florida

Florida takes the unlicensed practice of health care very seriously. First, Florida has an extremely broad definition for the practice of medicine. Second, Florida has very clear and severe punishments for unlicensed practice of all "health professions," including an explicit statement of legislative intent, and various administrative, civil, and criminal penalties.

Florida defines the practice of medicine as follows:

> 'Practice of medicine' means the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition.[79]

However, Florida does not limit its punishment for unlicensed activities to the "practice of medicine." Instead, Florida's unlicensed practice statute falls under the Chapter 456 of the Florida Statutes, which are "general provisions" for "health professions and occupations."[80]

Section 456.065 regulates the "unlicensed practice of a health care profession" as follows:

Legislative Intent

> (1) It is the **intent of the Legislature** that vigorous enforcement of licensure regulation for **all health care professions** is a state priority in order to **protect** Florida residents and visitors from the potentially **serious and dangerous consequences** of receiving medical and health care services from unlicensed persons whose professional education and training and other relevant qualifications have not been approved through the issuance of a license **by the appropriate regulatory board** or **the department**

[79] Appendix I, FLA. STAT. ANN. § 458.305 (West)

[80] *See* FLA. STAT. ANN. §456.001 (West) Definitions… "health care practitioners," means "any person licensed under chapter 457 [Acupuncture]; chapter 458 [Medical Practice]; chapter 459 [Osteopathic Medicine]; chapter 460 [Chiropractors]; chapter 461 [Podiatry]; chapter 462 [Naturopathy]; chapter 463 [Optometry]; chapter 464 [Nursing]; chapter 465 [Pharmacy]; chapter 466 [Dentistry]; chapter 467[Midwives]; part I, part II, part III, part V, part X, part XIII, or part XIV of chapter 468 [Miscellaneous professions, including speech pathology, occupational therapy]; chapter 478 [Electrolysis]; chapter 480 [Massage]; part III or part IV of chapter 483 [Clinical lab personnel, Medical Physicists]; chapter 484 [Hearing aids]; chapter 486 [Physical Therapy]; chapter 490 [Psychology]; or chapter 491 [Clinical, Counseling, Psychotherapy]." The section also defines "Profession" as "any activity, occupation, profession, or vocation regulated by the department in the Division of Medical Quality Assurance."

> **when there is no board**. The **unlicensed practice** of a health care profession **or** the **performance or delivery** of medical or health care services to patients in this state without a valid, active license to practice that profession, **regardless of the means of the performance or delivery of such services, is strictly prohibited.**[81]

With this explicit statement, the Florida Legislature recognizes the "serious and dangerous consequences" that result from unlicensed practice. And therefore, the "unlicensed practice" or "performance or delivery of medical or health care services" without a license are "strictly prohibited."

Administrative and Civil Remedies

The statute goes on to identify penalties for violations, starting with cease and desist orders, and administrative and civil penalties:

> (2) The penalties for unlicensed practice of a health care profession shall include the following:
>
> (a) When the department **has probable cause** to believe that any person not licensed…has violated any provision of this chapter or any statute that relates to the practice of a profession regulated by the department…the department may issue and deliver to such person a **notice to cease and desist** from such violation. **In addition**, the department may issue and deliver a notice to cease and desist to any person **who aids and abets** the unlicensed practice of a profession by employing such unlicensed person…
>
> (b) In addition to the remedies under paragraph (a), the department **may impose** by citation **an administrative penalty** not to exceed **$5,000 per incident**…**Each day** that the unlicensed practice continues after issuance of a notice to cease and desist **constitutes a separate violation…**
>
> (c) **In addition to or in lieu** of any other administrative remedy, the department may seek the imposition of a **civil penalty** through the circuit court for **any violation for which the department may issue a notice to cease and desist**. The civil penalty shall be no less than $500 and no more than $5,000 for each offense…[82]

[81] FLA. STAT. ANN. §456.065 (West); App'x I.
[82] Id.

This Section includes unique provisions, which grant the Florida Health Department administrative and civil remedies, in addition to other penalties and remedies provided by law. Also, the provision includes a probable cause requirement, and aggravating factors (similar to Oklahoma).

Criminal Penalties

The statute goes on to identify the various criminal penalties for violations:

> (d) **In addition to** the administrative and civil remedies under paragraphs (b) and (c) and **in addition to the criminal violations and penalties** listed in the individual health care practice acts:
>
> 1. It is a **felony of the third degree**…to **practice, attempt to practice, or offer to practice** a health care profession without an active, valid Florida license to practice that profession…**Holding oneself out**, regardless of the means of communication, as able to practice a health care profession or as able to provide services that require a health care license **shall be deemed** to be an attempt or offer to practice such profession without a license. **The minimum penalty for violating this subparagraph shall be a fine of $1,000 and a minimum mandatory period of incarceration of 1 year.**[83]
>
> 2. It is a **felony of the second degree**…to **practice a health care profession** without an active, valid Florida license to practice that profession **when such practice results in serious bodily injury**. For purposes of this section, "serious bodily injury" means death; brain or spinal damage; disfigurement; fracture or dislocation of bones or joints; limitation of neurological, physical, or sensory function; or any condition that required subsequent surgical repair. **The minimum penalty for violating this subparagraph shall be a fine of $1,000 and a minimum mandatory period of incarceration of 1 year.**[84]
>
> 3. It is a **misdemeanor of the first degree**…to **practice, attempt to practice, or offer to practice** a health care profession with an **inactive or delinquent license** for any period of time up to 12 months. **However**, practicing, attempting to practice, or offering to

[83] Note this is a minimum sentence, The maximum sentence is 5 years and the maximum fine is $5K, *See* FLA. STAT. ANN. §§ 775.082, 775.083 (West).
[84] Note this is a minimum sentence. The maximum sentence is 15 years and the maximum fine is $10K. *See* FLA. STAT. ANN. §§ 775.082, 775.083 (West).

> practice a health care profession when that person's license has been **inactive or delinquent for a period of time of 12 months or more shall be a felony of the third degree**…The minimum penalty for violating this subparagraph shall be a term of imprisonment of **30 days and a fine of $500.**[85]

Florida's criminal penalties are much different than any other State. Noticeably, the section specifies that these criminal penalties are in addition to the civil and administrative penalties, **as well as** other criminal violations and penalties. Some defendants have challenged this on grounds of constitutionality, and Florida courts have upheld a prosecutor's right to charge the defendant under either statute, or both.[86]

Also, this statute provides for different punishment based on conduct. First, it is a third degree felony to "practice, attempt to practice, or offer to practice… or hold oneself out." Second, if a person actually does practice (not attempt or offer to do so), and the result is a "serious bodily injury," the penalty increases to a second degree felony. Florida is the only state to specifically increase punishment when serious injury occurs.[87]

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[85] Supra n. 81.

[86] *See State v. Ngo Lanh Nguyen*, 980 So. 2d 1189, 1191 (Fla. Dist. Ct. App. 2008):

> Chapter 456 **expressly authorizes punishment** for the practice of a health care profession without a license **in addition to** the specific punishments meted out by the statute governing massage therapy. The plain language of section 456.065(2)(d)1. authorizes the State to charge an individual under that statute **"in addition" to** charging the individual under section 480.047. As such, the defendant was properly **charged under both statutes**… In closing, we note that a statute which authorizes prosecution of a particular criminal act as a felony is **not rendered unconstitutional**, as applied, **even though that criminal act may also constitute a misdemeanor**. *State v. Cogswell*, 521 So.2d 1081 (Fla.1988). As stated by the United States Supreme Court in *United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979):[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements.... **The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. (emphasis added).**

[87] Other states may rely on other criminal statutes in order to do so.

Florida also applies a lesser punishment in certain circumstances. As such, the section makes it a misdemeanor to "practice, attempt to practice, or offer to practice" if your license has been "inactive or delinquent" for less than a year (grace period). But if your license has been "inactive or delinquent" for more than a year, the penalty reverts to a felony, although there is a shorter minimum sentence.

Funding Statement

The Section includes a funding statement, which is feature unique to Florida.

> (3) Because all enforcement costs should be covered by professions regulated by the department, **the department shall impose, upon initial licensure and each licensure renewal, a special fee of $5 per licensee** to **fund efforts to combat unlicensed activity**. The department shall directly credit the Medical Quality Assurance Trust Fund, by profession, with the revenues received from the department's efforts to enforce licensure provisions. **The department shall include all financial and statistical data resulting from unlicensed activity enforcement as a separate category in the quarterly management report provided for in s. 456.025.** [88]The department shall also use these funds to **inform and educate consumers**[89] generally on the importance of using licensed health care practitioners.[90]

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On the whole, Florida's Section 456.065 is quite comprehensive. Using one section, Florida: (1) expressly states the legislative intent, (2) identifies serious penalties and remedies, and (3) provides funding for the "enforcement costs."

Provisions from Other States

The following provisions are from several other states and increase criminal or civil penalties, or expand culpability, which may increase the deterrent effect.

[88] Interestingly, these quarterly reports include descriptions of actions taken, and an accounting of funds in the unlicensed account, and other statistics. The latest report is attached as Appendix II; and includes a ending cash balance as of December 31, 2011 of $8,468,701; http://www.doh.state.fl.us/mqa/Publications/QMR_2_11-12.pdf.
[89] Examples include radio ads, billboards, mailings, television ads, etc. geared towards reporting unlicensed activity.
[90] *Supra* n. 81. (emphasis added).

Multiple Counts

The following states include language punishing each day of practice, each patient, or each injury, as separate and distinct offenses: Alaska, Arkansas, Connecticut, Florida, Georgia, Hawaii, Kentucky, Missouri, New Mexico, Oklahoma, South Carolina, Tennessee, Texas, Washington, and Wyoming.[91] These statutory provisions have generally been upheld when challenged under a theory of "ongoing" versus "separate" offenses.[92]

[91] App'x I.

[92] *See* 99 A.L.R.2d 654 (originally published in 1965)(emphasis added):

> In *Baldwin v District of Columbia*, 183 A2d 566, 99 ALR2d 651 (1962 Mun Ct App Dist Col), the defendant was convicted and given consecutive sentences on two [charges] based upon his treatment of two individuals on separate occasions about a month apart….the court stated that the question before it was whether the practice of podiatry without a license was **a continuing offense** for which the defendant could be tried and sentenced **as for only one crime**, or whether **each act of treatment could be prosecuted as a separate offense**. **Affirming the conviction, the court noted that the question was one of first impression for it and that in some jurisdictions the question is answered by statutes providing that each day of violation, or the treatment of each patient, shall be regarded as a separate offense, but that when the statute is silent, some cases suggest that evidence of a single treatment is insufficient proof of practice.** .., and where he holds himself out as a competent podiatrist, **each act of treatment constitutes a fresh menace, and each repetition a new threat of the abuse which the statute was designed to prevent.** …
>
> In State v Cotner 87 Kan 864, 127 P 1, 42 LRA NS 768, (1912), the defendant was convicted on eight counts… **Two counts were for treatment of two persons on a given date, five were for treating other persons on different dates, and the eighth was for opening an office for the reception and treatment of patients and placing a sign over the door advertising defendant as qualified to practice medicine**. The sentence to pay eight separate fines was contested on the ground that the **practice of medicine without a license was a continuing offense**. Stating that the question was one of statutory interpretation, the court cited the applicable statutes… [which] provided that the unlicensed practice of medicine and surgery constituted a misdemeanor punishable by fine **"for each offense."** The court held that **by virtue of the statutory definition of "practice" it was not necessary that the acts set forth be done frequently, customarily, or habitually, that one isolated act would be sufficient, that the penalty was affixed to each such offense, and that this view was supported by consideration of the purpose of the act to protect the life, health, and financial resources of individuals from ignorance and imposture**. The conviction was accordingly affirmed.

Increased Penalties for Repeat Offenders

The following states include language which increases penalties for repeat offenders (after a first conviction, as opposed to "separate counts" as outlined above): Colorado, Florida,[93] Illinois, Mississippi, New Hampshire, Ohio, Pennsylvania, Virginia, and Washington.[94]

Aiding and Abetting

The following states criminalize the "aiding or abetting" of the unlicensed practice of medicine: California, Florida[95], Nebraska, New Jersey, New York, Oregon, South Carolina, and Utah.[96]

Civil/Administrative Penalties

All states include some form of criminal fines in their penalties. However, the following states also authorize significant civil and administrative penalties for the unlicensed practice of medicine: Florida, Illinois,[97] Maryland,[98] New Hampshire,[99] and Pennsylvania.[100]

Part III –Enforcement

A statutory provision is only worthwhile if it can be implemented and enforced. State and local governments are often overwhelmed, understaffed, and underfunded. The following section will identify how Florida, California and Texas address enforcement issues.

Florida

[93] *See* FLA. STAT. ANN. § 775.084 (Multiple felony conviction statute).
[94] App'x I.
[95] *See* FLA. STAT. ANN. § 777.011
[96] Id.
[97] *Id.* The Illinois Department of Financial and Professional Regulation has the "authority and power to investigate any and all unlicensed activity." The civil penalty is up to $10,000 **for each offense**, must be paid within 60 days of the order imposing the penalty, and is the equivalent of a court judgment.
[98] *Id.* Maryland's Board can impose a "civil fine of not more than $50,000." Interestingly, prior to 2007, the penalty for the unlicensed practice of medicine was a misdemeanor and $5,000 criminal fine. In 2007, the crime became a felony, punishable by up to $10K fine and up to 5 years in prison. *See* HEALTH OCCUPATIONS—UNAUTHORIZED PRACTICE OF MEDICINE—PENALTY, 2007 MARYLAND LAWS CH. 359 (S.B. 851).
[99] *Id.* New Hampshire's Board may impose an administrative fine up to $50,000.
[100] Id.

Florida has a dedicated investigative arm for unlicensed activity. The Division of Medical Quality Assurance (MQA)[101] regulates 37 different types of facilities and 43 health care professions under Chapters 401, 456, and 468 of the Florida Statutes.[102] The MQA "evaluates the credentials of licensing applicants, issues licenses, investigates complaints, inspects facilities, and assists in prosecuting practice act violations and decreasing unlicensed activity."[103]

Procedure

The MQA has a specific unlicensed activity unit (ULA).[104] The ULA works in conjunction with law enforcement and the state's attorney to prosecute unlicensed practicioners.[105] All complaints are routed centrally through the Florida Department of Health.[106] If the preliminary reviewer finds the complaint "legally sufficient," they forward it to a ULA investigator in the office nearest to the complaint location.[107] The investigator may then interview the complainant, contact local law enforcement, gather documents, conduct surveillance and interview witnesses. [108] If the investigator finds that the allegations are supported, the investigation concludes with either: (1) an arrest by local law enforcement, (2) issuing a "Uniform Unlicensed Activity Citation," or (3) issuing a "Cease and Desist Agreement."[109]

[101] MQA is a division of the Florida Department of Health.
[102] MQA ANNUAL REPORT, JULY 1, 2010-JUNE 30, 2011, http://doh.state.fl.us/mqa/Publications/10-11mqa-ara.pdf
[103] *Id.* MQA works in conjunction with 22 different professional boards as well.
[104] http://www.doh.state.fl.us/mqa/unlicensed/unlic_report.html
[105] Id.
[106] Id.
[107] *Id.* The ULA program has a total of 14 ULA investigators in 12 field offices throughout Florida.
[108] Id.
[109] Id.

The ULA conducts these investigations to develop probable cause in order for local law enforcement or state's attorneys to file criminal charges.[110] For that reason, many ULA investigators conduct joint investigations with law enforcement agencies, with notable success.[111]

Additionally, MQA has the authority under Section 456.065 of the Florida Statutes to impose administrative penalties, issue cease and desist orders, and seek civil penalties from the circuit courts for any violations of cease and desist orders.[112]

Budget

Section 456.065(3) of the Florida Statutes provides funding for the ULA.[113] Under the provision, all licensees must pay a $5 special fee for both initial licensing and each renewal.[114] The department must include "all financial and statistical data resulting from unlicensed activity enforcement as a separate category" in the "quarterly management report provided for in s[ection] 456.025."[115] The latest quarterly report shows a beginning cash balance of $7,955,409, revenues of $1,217,880, expenditures of $704,588, and an ending cash balance of $8,468,701.[116]

California

Vertical Prosecution Model

The California Legislature recently implemented drastic changes to its Medical Board Enforcement Program. In 2002, Senate Bill 1950 added section 2220.1 to the Business and

[110] Id.
[111] *Id.;* supra n. 101 at p.37 (For example, the MQA Annual Report for July 1, 2010-June 30, 2011 shows the following statistics: Complaints Received:792; Referred for Investigation:659; Investigations Complete: 862 (must include investigations from the prior fiscal year completed in this period); Cease and Desist Issued : 290; Referrals to Law Enforcement: 392; Arrests: 55; Convictions: 28.) Also, law enforcement is not required to report actions to the Florida Department of Health so the data is limited to complaints received. According to material assembled by MQA, ULA investigators and local law enforcement have been conducting joint undercover operations to expose unlicensed practice.
[112] *Supra* at p. 20.
[113] *Supra* n. 81.
[114] Id.
[115] Id.
[116] *Supra* n. 87.

Professions Code of California.[117] Under Section 2220.1, an "independent Medical Board Enforcement Program Monitor" was authorized to evaluate "the disciplinary system and procedures of the board."[118]

One of the Monitor's primary concerns was the "inefficient and outdated" structure of the Medical Board's enforcement program.[119] Under the enforcement program, an investigator would "work up a case" and hand it off to a Deputy Attorney General who had no involvement or input into the planning or investigative process.[120] At that point, the deputy would then proceed with no further assistance from the investigator. [121] On the other hand, other law enforcement agencies used a "vertical prosecution model."[122] Under that model, the investigators and prosecutors actually work for the same agency, and a team is assigned to a case to handle the investigation from beginning to end.[123]

Based on the Monitor's findings, the California legislature enacted "vertical prosecution" in Senate Bill 231 in 2005.[124] Section 12529.6 states the following:

> (a) The Legislature finds and declares that the Medical Board of California, by ensuring the quality and safety of medical care, performs one of the most critical functions of state government. Because of the critical importance of the board's public health and safety function, the complexity of cases involving alleged misconduct by physicians and surgeons, and the evidentiary

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[117] JULIANNE D'ANGELO FELLMETH, THOMAS A. PAPAGEORGE, CTR. FOR PUB. INTEREST LAW, UNIV. OF SAN DIEGO SCH. OF LAW, FINAL REPORT, MEDICAL BOARD OF CALIFORNIA ENFORCEMENT PROGRAM MONITOR ES-1, November 1, 2005.
[118] *Id.* The "Monitor" was authorized for a two years.
[119] *Id.* at ES-3;*see also* at 65. ("**but a system which inhibits MBC from bringing at least some actions to stop economic harm or unlicensed conduct sends a dangerous signal that such misconduct is tolerated in California**. Today, fraud (including egregious insurance fraud that does critical systemic damage to our health care system) and deceptive business practices which injure honest practitioners and consumer victims **are relegated to a very low priority by MBC in its current interpretation of its mandate**")(emphasis added).
[120] Id.
[121] Id.
[122] Id.
[123] Id.
[124] CAL. GOV'T CODE § 12529.6 (West)

burden in the board's disciplinary cases, **the Legislature finds and declares that using a vertical enforcement and prosecution model for those investigations is in the best interests of the people of California.**

(b) …each complaint that is referred to a district office of the board for investigation shall be **simultaneously and jointly assigned to an investigator and to the Deputy Attorney General in the Health Quality Enforcement Section responsible for prosecuting the case if the investigation results in the filing of an accusation**. The **joint assignment of the investigator and the Deputy Attorney General shall exist for the duration of the disciplinary matter**. During the assignment, the investigator so assigned shall…be responsible for **obtaining the evidence required to permit the Attorney General to advise the board on legal matters** such as whether the board should file a formal accusation, dismiss the complaint for a lack of evidence required to meet the applicable burden of proof, **or take other appropriate legal action.**

. . .

(e) It is the **intent of the Legislature to enhance the vertical enforcement and prosecution model** as set forth in subdivision (a). The Medical Board of California **shall do all of the following**:

(1) Increase its computer capabilities and compatibilities with the Health Quality Enforcement Section in order to share case information.

(2) **Establish and implement a plan to locate its enforcement staff and the staff of the Health Quality Enforcement Section in the same offices**, as appropriate, **in order to carry out the intent of the vertical enforcement and prosecution model.**

(3) Establish and implement a plan to assist in team building between its enforcement staff and the staff of the Health Quality Enforcement Section in order to ensure a common and consistent knowledge base.[125]

.

Process

Essentially, California's process is quite similar to Florida. First, a consumer makes a complaint to the Board, which is directed to the "Central Complaint Unit (CCU)."[126] Next, a Deputy Attorney General and the "Complaint Unit Analyst" determine if an immediate

[125] *Id.* (emphasis added).
[126] http://www.mbc.ca.gov/enforcement_process.pdf

investigation is needed, or if some other action is warranted.[127] If an investigation is warranted, the CCU forwards the information to a District Office closest to where the alleged acts occurred.[128] The case is assigned to an investigator and a Deputy AG, who work on the case until it is either: (1) Closed; (2) Referred for disciplinary action; or (3) referred for other action (including criminal prosecution).[129] The team forwards the file to a district attorney in the appropriate jurisdiction if criminal prosecution is sought.[130]

Texas

In Texas, the "local prosecuting officers" of each county enforce the unlawful practice of medicine.[131] Additionally, the Texas State Medical Board has adopted procedures to deal with complaints, as follows:

> (a) Purpose. The purpose of this subchapter is to **establish procedures for the handling of complaints and proceedings** regarding **the unlicensed practice of medicine** and other violations of the Medical Practice Act…
>
> (b) … the board may enter a **cease and desist order** … if directed to do so by a Cease and Desist Panel after the conclusion of a **full adversarial evidentiary hearing**. A panel shall be composed of **two board representatives.**
>
> (c) **Referrals to other Governmental Entities**.
>
> (1) Complaints to the board regarding **the unlicensed practice of medicine** … shall be routed to one or more of the following for appropriate handling including **further investigation, cease and desist proceedings, criminal prosecution, and/or injunctive relief:**
>
> (A) the Investigation Division of the Board;
> (B) the Office of the Attorney General;
> (C) the Texas Department of Public Safety;
> (D) the DEA;

[127] Id.
[128] Id.
[129] Id.
[130] Id.
[131] TEX. OCC. CODE ANN. § 165.157 (West) (which also states that the board and its employees **shall assist** in investigations).

(E) the Texas Department of State Health Services;
(F) the local district or county attorney's office with jurisdiction;
(G) the local law enforcement agency;
(H) any state or federal licensing board

(2) In any instance in which the board may **have concurrent jurisdiction**[132] with another agency over the subject of a complaint under this section, the board **may pursue further investigation and appropriate action before or after routing the complaint to another agency.**

(3) The routing of a complaint to another agency as provided by this section **shall be in writing** unless to do so is likely to jeopardize any further investigation, prosecution, or injunctive relief.[133]

Therefore, while the Medical Board does not have "jurisdiction" over unlicensed practicioners, it does recognize the importance of a complaint process.

Analysis

Overall, Florida's enforcement process seems to be the most successful. A recent report to the California Legislature suggests the "vertical prosecution" model is having little success.[134] Florida, on the other hand, has experienced successful joint task forces, enjoys a budget surplus, provides the necessary information to pursue prosecutions and other actions, and avoids complicated jurisdictional issues by having a dedicated ULA division.[135]

Part IV – A Uniform Statute

Keeping in mind the concerns and policies outlined above, the following is a proposed uniform statute for the unlicensed practice of medicine.

> Section XXX.XXX. Unlicensed practice of medicine; legislative intent; definitions; penalties; enforcement; citations; fees

[132] Concurrent jurisdiction may occur when a licensed doctor is aiding or abetting an unlicensed practicioner.
[133] 22 TEX. ADMIN. CODE § 187.83.
[134] http://www.mbc.ca.gov/publications/vert_enf_model_report_2012_03.pdf. The report notes that the lack of success may be caused also by general budgetary problems, lack of communication and cooperation amongst Deputy AG's and investigators, staffing vacancies and turnover, and technological issues.
[135] See generally, supra n. 101.

(1) The unlicensed practice of medicine is a serious and dangerous threat to the state's residents and visitors. The state has extensive police power to regulate licensing and enforcement of professions within its borders. It is the intent of the Legislature to encourage vigorous enforcement and prosecution of the unlicensed practice of medicine and protect all persons from the serious and dangerous consequences of unlicensed practice.[136]

(2) For purposes of this section, the "practice of medicine" means:

a. Offering or attempting to prevent, prescribe, diagnose, correct or treat in any manner, using any means, methods or devices any disease, illness, pain, wound, fracture, injury, deformity, mental or physical condition; or
b. Offering or attempting to provide any other medical services pursuant to Chapter XXX, XXX, etc.[137]
c. Advertising, holding out, or representing, in any manner, that he or she is authorized or licensed to practice medicine in this state; or
d. Except as otherwise provided by law, offering or attempting to perform non-surgical cosmetic procedures. "Non-surgical cosmetic procedure" means injecting into any person, using any means, methods or devices, any liquid including but not limited to: Botox, silicone, collagen, fat, or any similar substance, for the purpose of structurally altering or reshaping the human body[138]; or
e. Offering or attempting to administer, dispense or prescribe a prescription drug or medicine for the use of another person; or
f. Using words or letters, such as "Dr.," "Doctor," "M.D.," "physician," "D.O.," "D.P.M.," "D.C.," or any other title or letters that imply medical authority; or
g. Maintaining an office or place of business for the purpose of providing any acts described in sections (a), (c), or (d) above, whether or not for compensation.
h. The provisions of this section do not apply to any person who is a duly licensed health care provider under other provisions of this code and who is acting within the scope of his or her license.[139]

(3) **Unlicensed practice of medicine**. Any person who:

[136] This first paragraph is designed as a statement of clear legislative intent to support the use of state police power.
[137] This provision allows for the criminalization of other health practices that are codified separately.
[138] This provision addresses concerns associated with unlawful injections and "pumping parties" prevalent in some states.
[139] This provision allows for other medical branches to practice within their scopes without the threat of prosecution under this statute.

a. practices, attempts to practice, or offers to practice medicine in this State without possessing a valid license from the appropriate board; or
b. conspires with or aids or abets[140] another to commit an act described in subdivision (a);
c. shall be guilty of the unlicensed practice of medicine.
d. For the purposes of this subsection, each violation shall constitute a separate criminal offense.[141]

(4) **Criminal Penalty.** The criminal penalties for the unlicensed practice of medicine shall include the following:

a. It is a XXX degree felony to engage in the unlicensed practice of medicine. The minimum penalty for violating this subparagraph shall be a fine of $5,000 and a minimum mandatory period of incarceration of 1 year.
b. It is a XXX degree felony to engage in the unlicensed practice of medicine when such practice results in serious bodily injury. For purposes of this section, "serious bodily injury" means death; brain or spinal damage; disfigurement; fracture or dislocation of bones or joints; limitation of neurological, physical, or sensory function; or any condition that required subsequent surgical repair. The minimum penalty for violating this subparagraph shall be a fine of $5000 and a minimum mandatory period of incarceration of 3 years.[142]
c. It is a XXX degree felony to engage in the unlicensed practice of medicine when such practice results in death. The minimum penalty for violating this subparagraph shall be a fine of $10,000 and a minimum mandatory period of incarceration of 7 years.[143]
d. It is a XXX degree misdemeanor to engage in the unlicensed practice of medicine with a license that has been expired for less than 12 months. However, engaging in the unlicensed practice of medicine with a license that has been expired for longer than 12 months shall be a XXX degree felony, and the minimum penalty shall be a fine of $500 and a minimum incarceration period of 6 months.[144]
e. Nothing in this section shall preclude any other administrative, civil, or criminal penalties or remedies provided for by law.[145]

[140] This provision increases the deterrent effect punishing those that encourage and support unlicensed practice.
[141] This provision also increases the deterrent effect as well.
[142] This provision is designed to increase penalties in cases that result in serious harm (similar to Florida).
[143] This provision increases penalties in cases that result in death.
[144] This provision recognizes circumstances for mitigating circumstances.
[145] This provision allows prosecutors to pursue charges under any other practice act or statute, i.e. unlicensed practice of dentistry, in addition to this provision.

Optional Provisions[146]

(5) **Civil Penalty.**[147]

a. The Department has the authority and power to investigate any and all unlicensed activity.
b. In addition to any other penalty provided for by law, the Department may assess a civil penalty as follows:
    i. The Department may conduct a hearing pursuant to the provisions governing discipline of a licensee, provided for in Chapter XXX.
    ii. If the Department finds at such hearing that the person engaged in the unlicensed practice of medicine as provided in section 3 above, the Department shall impose a civil penalty not to exceed $10,000.00 for each offense.
    iii. The Department shall issue an order for payment of the entire amount of the civil penalty. The civil penalty shall be paid within 60 days of issuance of the order, and shall have the same effect as any judgment from any court of record.

(6) **Injunction**[148]

a. In addition to any other penalty provided for by law, the Department, Board, State Attorney General, or any district attorney may obtain an injunction from any court of record enjoining any person from engaging in the unlicensed practice of medicine pursuant to XXX[149] of the Civil Rules of Procedure.
b. The court may issue the injunction upon a showing of probable cause that one or more violations of the unlicensed practice of medicine has occurred.

(7) **Funding**[150]

a. The Department shall impose, upon initial licensure and each renewal, a special fee of $5 per licensee to fund efforts to combat licensed activity. The department shall publish quarterly a statement showing financial and statistical data resulting from the unlicensed activity enforcement. The Department shall also use funds to increase awareness and educate consumers regarding the importance of using licensed providers.[151]

Part V – Conclusion

[146] These would depend on whether the state would want to have a department or board in charge of these regulations, similar to Illinois, California, and Florida.
[147] This provision increases revenues to allow for increased enforcement activities and programs.
[148] This provision allows for immediate relief to stop unlicensed practicioners.
[149] Each state should have a corresponding Rule of Civil Procedure governing injunctions, similar to Fed. R. Civ. P. 65.
[150] This provision is a good way for states to address budgetary concerns through self-funding.
[151] This provision specifically encourages increased awareness programs and education, as well as detailed progress reports measuring results.

The unlicensed practice of medicine is dangerous. The practice is nothing new, but has recently become more prevalent. While all states recognize the danger, there is a wide variety of definitions, statutory provisions, punishments, and enforcement actions. By implementing a more uniform approach, increasing enforcement efforts, and increasing penalties, states should be able to take additional steps to curb these activities and deter this dangerous conduct.